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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-211

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,

Petitioner,

v.

NEWPORT TANKERS CORPORATION

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR NEWPORT TANKERS CORPORATION IN OPPOSITION

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Respondent Newport Tankers Corporation opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 575 F.2d 477 (Pet. App. 1a-8a). The Decision and Order of the National Labor Relations Board, including the

Decision of the Administrative Law Judge, are reported at 233 NLRB No. 42 (Pet. App. 11a-37a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1978 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on August 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The time for filing this Opposition has been extended by this Court.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Appeals properly concluded that the Petitioner (hereafter, "MMP" or "Union") restrained and coerced Newport Tankers Corporation in the selection of its representatives for the purposes of the adjustment of grievances by picketing its ship in order to force it to hire an additional third mate.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, *as amended* (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) are set forth at Pet. 2-4.

STATEMENT OF THE CASE

A. The Board's Findings of Fact

The Board's findings of fact, which were adopted by the Court of Appeals, are not disputed by the Petitioner herein. They may be summarized as follows:

This case is the most recent in a series of incidents arising out of a rivalry between the MMP and Marine Engineers Beneficial Association (hereafter, "MEBA")

regarding the representation of licensed deck officers aboard American flag vessels.[1]

Newport Tankers Corporation is the owner of the S/T *Achilles,* an American flag vessel that, in 1976, was under charter to transport grain from the United States to the Soviet Union (Pet. App. 2a). Newport's agents, OBO Ship Operators, Inc., operated the S/T *Achilles* and had a collective bargaining agreement with MEBA covering the ship's licensed deck officers (Pet. App. 2a).[2]

On the evening of April 13, 1976, the *Achilles* docked in Chesapeake, Virginia at a berth owned and operated by Cargill, Inc., for the purpose of loading grain for shipment from Cargill's grain elevator (Pet. App. 2a). The next morning, before loading could begin, MMP picketed at the dock near the vessel, the picket signs stating:

> S.S. ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT.
>
> THE SECOND AND THIRD MATES ARE EMPLOYED UNDER SUBSTANDARD CONDITIONS. WE ARE NOT SEEKING THE REPLACEMENT OF ANY PERSONS EMPLOYED ABOARD THE S.S. ACHILLES. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL AT THIS FACILITY.
>
> OFF SHORE DIVISION OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS (Pet. App. 2a-3a).

[1] See, *e.g., International Organization of MMP (Westchester Marine Shipping Co., Inc.),* 219 NLRB 26 (1975), *enforcement granted,* 539 F.2d 554 (5th Cir. 1976), *cert. denied,* 98 S. Ct. 106 (1977); *International Organization of MMP (Marine and Marketing International Corp.),* 197 NLRB 400 (1972), *enforcement granted,* 486 F.2d 1271 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 956 (1974); *International Organization of MMP (Cove Tankers Corporation),* 224 NLRB 1676 (1976), *enforcement granted,* 575 F.2d 896 (D.C. Cir. 896) (1978).

[2] The unlicensed crew were represented by the Seafarers International Union (Pet. App. 2a).

As a result of the picketing, Cargill's employees, who are represented by the International Longshoremen's Association, refused to load the ship until after an injunction had been obtained in the United States District Court following the filing of the instant unfair labor practice charge (Pet. App. 3a).

Both the Board and the Court concluded that the second and third mates of the S/T *Achilles* are vested with the authority to, and do in fact, adjust grievances as part of their usual duties and on the specific orders of the ship's master, Captain Arthur Fertig (Pet. App. 32a). The Petitioner does not here seek review of that determination.[3]

In most, but by no means all, of its contracts MMP provides for a licensed deck complement of two third mates as well as a master, a first mate and a second mate.[4] In contrast, MEBA offers employers contracts which are more favoable to them, requiring only a master and *three* mates (Pet. 5).

Thus, it is undisputed that an object of the picketing carried on by MMP was to eliminate MEBA's competitive advantage by forcing the employer to increase its complement of deck officers by the hiring of an additional third mate (Pet. 9-10).

[3] Nor does the Petitioner here seek review of the Board and Court's determinations that it is in fact a "labor organization" within the meaning of Section 2(5) of the National Labor Relations Act. See, *e.g., International Organization of Masters, Mates & Pilots v. N.L.R.B.*, 122 U.S. App. D.C. 74, 80, 351 F.2d 771, 777 (1965).

[4] Petitioner's assertion that "[i]ts standard collective bargaining agreement provides . . . that the employers will maintain a minimum deck-officer complement of a master and four mates" (Pet. 5; see also Pet. 12), omits the fact that it is not MMP's universal practice to require two third mates. To the contrary, MMP has a number of contracts providing for manning identical to MEBA's, *i.e.*, a master and *three* mates (Pet. 24a, 33a-34a, n.7).

B. The Decisions Below

1. *The Board's Conclusions and Order*

The Administrative Law Judge who heard this case found that MMP's picketing violated Section 8(b)(1)(B) of the Act because it had as an object to force Newport to hire an additional third mate to its complement of licensed deck officers, thus restraining and coercing Newport in the selection of its representatives for the adjustment of grievances. The Judge recommended that MMP cease and desist from such conduct and that it post an appropriate notice.

The Board panel, by a two-to-one vote, reversed the Judge and dismissed the complaint. In the majority's view, the fact that MMP was seeking to force Newport to add another third mate to its complement of licensed deck officers, did not constitute restraint or coercion within the purview of Section 8(b)(1)(B). Dissenting Member Penello would have affirmed the Judge and would have found a violation of Section 8(b)(1)(B).

2. *The Decision of the Court of Appeals*

The Court of Appeals vacated the Board's Order and determined that "the picketing by MMP was in violation of § 8(b)(1)(A)" (Pet. App. 8a). Relying upon the rationale applied by both the Administrative Law Judge and the dissenting Board member, the Court properly concluded:

> [T]he distinction between the picketing here and that in the previously decided cases is a distinction without a difference. The objective of the statute is to proscribe restraint or coercion of an employer in the selection of his representatives for the purpose, *inter alia*, of the adjustment of grievances. There is, of course, a difference of degree in the restraint or coercion of an employer by picketing to accomplish the replacement of a given employee rather than to dilute the authority of that employee by requiring that at least some of his duties be performed by others. But aside from degree, we think that

> picketing to dilute the authority of an employee to adjust grievances is no less within the proscription of the statute (Pet. App. 6a).

Thus, the Court rejected the contention that the picketing fell outside the purview of Section 8(b)(1)(B) because it was not carried out with an object of forcing the employer to *replace* the existing third mate, or to designate a *specific individual* to perform grievance-adjusting functions (Pet. App. 6a-7a). Tracing the earlier case history of the protracted dispute between MMP and MEBA over jobs,[5] the Court recognized the "'fact of life' that the actual object of MMP's picketing was the eventual replacement of the ship's deck officers with MMP members" (Pet. App. 7a).

ARGUMENT

I.

The history of the dispute between MMP and MEBA relating to the representation of licensed deck officers on American flag ships, dates back to the late 1950's, with both unions seeking to represent this group of officers. As the Court of Appeals for the Fifth Circuit noted in *International Organization of Masters, Mates and Pilots v. N.L.R.B., supra,* 539 F.2d at 556-557:

> Since the late 1950's, MM&P has been engaged in a burgeoning jurisdictional dispute with MEBA over the right to represent licensed deck officers manning United States merchant vessels. Representation of the licensed deck officers who will serve upon a particular vessel by either MM&P or MEBA, as the case may be, is determined when the vessel's operators execute a contract with the union of their choice at or near the time when construction of the vessel is completed. The competition between the two unions has heightened since 1970 because of renewed shipbuilding activity fostered in principal part by a federal subsidy program.

[5] See cases cited at n.1, *supra.*

> Because its contract is more favorable to vessel operators in many respects than the standard MM&P contract, MEBA holds a substantial competitive advantage in the fight to represent licensed deck officers on the newest generation of United States merchant vessels. MM&P's contract, for example, requires manning by a master and four mates; the MEBA contract, by contrast, only requires manning by a master and three mates. Additionally, there is a wage differential favoring the MEBA contract, and an alliance between MEBA and the Seafarers International Union, which represents unlicensed personnel, has worked in the past as an inducement for vessel operators to accept the MEBA contract.

The case at bar is merely another battle in the jurisdictional war between MMP and MEBA. As the cases show, each battle has been fought on somewhat different grounds, with MMP changing its tactics to meet the adverse findings of prior cases, but not changing its ultimate goal to win back from MEBA representation of the masters and mates of American flag ships, first by direct action and, failing that, by indirection as in this case.

Significantly, in every previous case that has addressed this dispute, the Board has found that MMP's conduct violated Section 8(b)(1)(B) of the Act, the Courts of Appeals have affirmed, and this Court has consistently denied review of those decisions.

For example, in *International Organization of MMP (Marine and Marketing International Corp.),* 197 NLRB 400 (1972), *enf'd.* 486 F.2d 1271 (D.C. Cir., 1973), *cert. denied* 416 U.S. 956 (1974), MMP picketed a vessel with the object of forcing its owners to replace the MEBA-represented masters and mates with licensed deck officers represented by MMP. The Board concluded that this picketing violated Section 8(b)(1)(B) of the Act because: (1) the master and the first, second and third

mates all had grievance-adjustment responsibilities as part of their duties; (2) the picketing constituted restraint and coercion; and (3) the object of the picketing — the replacement of the MEBA-represented officers by MMP-represented officers — fell within the purview of Section 8(b)(1)(B) of the Act (197 NLRB at 402-403). The Court of Appeals for the District of Columbia Circuit (Judge Bazelon dissenting) granted enforcement of the Board's order, upholding the Company's "right to be free from coercion in the selection of grievance adjusters. * * * The Company has an interest in being free from coercion from labor organizations in the selection of grievance adjusters, no matter what its reasons for choosing one union over the other." 486 F.2d at 1275.

The following year, both the Board and the Court of Appeals for the Fifth Circuit ruled that picketing by MMP to force the operators of two new ships to agree to operate under the terms of the standard MMP contract and to replace the MEBA-represented deck officers chosen by the ships' operators with deck officers represented by MMP, was violative of Section 8(b)(1)(B). *International Organization of MMP (Westchester Marine Shipping Co., Inc.),* 219 NLRB 26 (1975), *enf'd.* 539 F.2d 554 (5th Cir. 1976), *cert. denied,* 98 S. Ct. 106 (1977). In enforcing the Board's order in *Westchester Marine,* the Fifth Circuit rejected MMP's contention — a contention which is repeated in the instant Petition (Pet. 17) — that its sole object was to force the ships to meet MMP's manning requirements:

> For [the ship operators] to have met MM&P labor standards, particularly the manning requirement in the standard MM&P contract, would have necessitated a breach of the then-effective collective bargaining contract between the employers and MEBA. Recognition of MM&P by the employers and execution of an appropriate collective bargaining agreement between those employers and MM&P would similarly have forced a breach of the existing contract. The Board asserts that MM&P's attainment of any or all of the sought-after objectives of its picketing would have compelled MEBA to forbid its members from serving on the Ultramar or the Sugar Islander, and we have no difficulty accepting this assertion. Maintaining its competitive edge in the fight to represent licensed deck officers on ocean-going vessels turns largely on the ability of MEBA to offer employers an economical contract, which will in turn permit effective competition between United States and foreign flag vessels. Consequently, even if the only objective in fact attained were adherence to MM&P labor standards, the threat to MEBA would still be clear. The threat to MEBA raised by recognition and a collective bargaining agreement between the employers and MM&P is, of course, even more substantial. The probable and foreseeable result of MM&P's picketing for any or all the objects discussed above would be, we feel, unnecessary restriction of the class of individuals available as licensed deck officers to members of MM&P and no others. Picketing for each of these objects violated Section 8(b)(1)(B).

539 F.2d at 561.

MMP's next attempt at achieving its clearly recognizable goal of compelling the replacement of MEBA crews with its own members met the same fate in *International Organization of MMP (Cove Tankers Corporation),* 224 NLRB 1626 (1976), *enf'd.* 575 F.2d 896 (D.C. Cir., 1978). In *Cove Tankers,* as in the instant case, MMP picketed a ship manned by MEBA members, with signs directed at the vessel's allegedly "substandard manning." 575 F.2d at 902. The Court of Appeals for the District of Columbia Circuit unanimously[6] affirmed the Board's finding that the Union's conduct was "directed toward (1) replacement of the MEBA officers with MMP

[6] Judge Bazelon, who had dissented from the majority opinion in *Marine Marketing, supra,* joined in the Court's opinion in *Cove Tankers.*

members, (2) recognition of MMP by Cove [and] (3) adoption of the standard-form MMP collective bargaining agreement by Cove." 575 F.2d at 902.

The facts which give rise to the instant case are merely another chapter in what the Board characterized in *Cove Tankers* as a "battle over jobs" between MMP and MEBA. The Court below properly recognized MMP's conduct for what it was, and, agreeing with the dissenting Board member, determined that the picketing of the S/T *Achilles* was carried out with the same proscribed objectives as those found in *Marine Marketing, Westchester Marine* and *Cove Tankers, supra* (Pet. App. 5a-7a).

II.

The Petitioner contends that "Section 8(b)(1)(B) . . . was not directed at concerted activities by supervisors at all, but was concerned with an entirely different problem. Its purpose was to prevent a union which represents an employer's rank-and-file 'employees' from attempting to influence or control the employer's labor relations policies by influencing or controlling the selection of the personnel who make or implement such policies . . ." (Pet. 13). Reciting remarks made by Senator Taft during the 1947 legislative debate over Section 8(b)(1)(B), Petitioner asserts that that provision was never intended to apply to a situation where a labor organization does not represent rank-and-file employees "seeking to influence the employer's collective bargaining or grievance-adjusting policies" (Pet. 14).

This argument was unsuccessfully proffered by the Petitioner in *Marine and Marketing, Westchester Marine* and *Cove Tankers, supra.* In both the *Marine and Marketing* and the *Westchester Marine* cases, *supra,* Petitioner urged this Court to grant its petitions for certiorari by focusing particularly upon this issue of

law. In both cases, this Court denied review of the lower courts' rulings on that question. Moreover, in *Cove Tankers, supra,* Judge Bazelon of the Court of Appeals for the District of Columbia Circuit joined his colleagues in sustaining the Board's finding of a Section 8(b)(1)(B) violation although, as Petitioner points out (Pet. 15), he initially disagreed with this conclusion in *Marine and Marketing, supra.*

In view of the apparent unanimity of opinion between the Board and all the reviewing courts on the applicability of Section 8(b)(1)(B) to the kind of conduct engaged in by MMP in the above-described cases, as well as in the instant case, it is respectfully submitted that review by this Court is neither necessary nor warranted.

III.

Petitioner contends that the Court of Appeals' departure from the Board's conclusions of law represents a serious "failure to follow this Court's directives as to the deference owed the Board's interpretation of the Act" (Pet. 17). It should be noted, however, that the Board Decision in this case represents far from a consensus of its members. Rather, it is the opinion of only two of its five members. Indeed, the majority opinion prompted a vigorous dissent by Member Penello, who took particular exception to what he characterized as the majority members' "tortured reasoning," as well as its departure from the Board's (and courts') prior decisions:

> My colleagues say that legislative history shows that Congress intended only to prohibit unions from restraining or coercing employers in the selection or replacement of a particular identified individual or group as an 8(b)(1)(B) representative, and did not mean to prevent unions from pressuring employers in connection with deciding how many such representatives there should be. They

also argue that Board case law is consistent with this reading of the statute.

. . .

Section 8(b)(1)(B) prohibits a union from using restraint or coercion against an employer in the selection of his collective-bargaining representatives or grievance adjusters. An employer's selection of his 8(b)(1)(B) representatives, however, cannot be artificially subdivided into selection of a particular individual or group, which the statute is said to protect, as opposed to the number of such representatives, which is asserted to be left subject to union pressure. For the right to designate a particular individual as a grievance adjuster or collective-bargaining representative carries with it the implicit authority to confine the exercise of 8(b)(1)(B) responsibilities to that person. As an example, an employer may have chosen a certain individual to handle grievance matters for him, because of the employer's confidence in his ability, experience, and trustworthiness, and may, for that reason, desire that this person, and only this person, adjust grievances. Yet, under the majority view, the employer could be forced by a union to increase the number of individuals performing this task, thus insuring that responsibility for adjustment of grievances would be divided among several people and diluting the authority of the person whom the employer would prefer to handle all his grievances.

. . .

In any event, I am convinced that the actual object of MMP's picketing was the replacement of the ship's officers with MMP members. . . . (Pet. App. 21a-23a).

The Court of Appeals approached the facts of this case in much the same way as Member Penello: "We think picketing to dilute the authority of an employer to adjust grievances is no less within the proscription of the statute" than picketing to accomplish the replacement of a given employee (Pet. App. 6a). In arriving at

that conclusion, both the Court and the dissenting Board member relied upon the Board's earlier decision in *Laborers' Local 478 (International Builders of Florida)*, 204 NLRB 357 (1973), *enf'd.* 503 F.2d 192 (D.C. Cir. 1974). The facts of that case are accurately described by the Petitioner (Pet. 15, n.7), whose effort to distinguish it from the case at bar exposes the fallacy of its argument:

> In that case, a union struck to force an employer to reinstate a former supervisor (Davis) who had been demoted. The union considered another foreman who had been retained (Wilson) to be racially biased, and wanted Davis to be reinstated either in place of Wilson or as an intermediary between Wilson and the employees. The strike in *Laborers* was thus aimed at "diluting" the authority of Wilson. Nothing of the kind, however, was involved in the present case. MMP did not desire to "dilute" anyone's authority; it merely wanted the employer to employ four mates in order to prevent erosion of MMP's manning standard (*ibid.*).

In the present case, it is clear that the natural and probable consequence of MMP's conduct necessarily would have been to impact adversely upon the performance of grievance-adjustment duties by the single third mate chosen by the employer to serve in that capacity.[7] In these circumstances, MMP's purported motivation is essentially irrelevant. See *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

[7] Petitioner suggests that it never insisted that "any additional mate hired by the employer be given grievance-adjusting authority; the employer, if it desired, could have hired an additional mate without giving him such authority" (Pet. 15-16). Thus, the Petitioner would not only like to impose upon Newport an additional third mate, but would also dictate the scope of the authority attendant to that position if it would help preserve its right to picket a ship with which it had a similar dispute. Suffice it to say that aboard the *Achilles, all* deck officers had grievance-adjustment functions among their duties (Pet. 2a, 29a-30a).

In view of the long history of jurisdictional strife between MMP and MEBA, the Court of Appeals properly viewed the facts of this case with the same perspective applied by the Courts of Appeals for the Fifth and District of Columbia Circuits, and acted consistently with virtually every previous Board decision that has addressed this issue. *See, e.g., International Organization of Masters, Mates, and Pilots (Seatrain Lines, Inc.),* 220 NLRB 164 (1975); *Cove Tankers, supra,* and cases cited therein. The Court's decision, which rectifies the sole deviation from precedent demonstrated by the Board majority herein, does not present an issue warranting review by this Court.

Contrary to Petitioner's assertion (Pet. 18), this is not a case in which the Court of Appeals "approached the matter as if it were an original question, and adopted its own interpretation of the statute." To the contrary, the Court's opinion contains a carefully reasoned discussion of Section 8(b)(1)(B), which is grounded in heretofore consistently applied *Board* law. In sum, the Court's opinion here must be read in light of the facts of this particular case and in full consideration of the serious consequences which could flow from the Board's erroneous decision: All MMP would need to do would be to picket every MEBA-represented ship demanding the employment of an unnecessary and unwarranted third mate. By virtue of MMP's affiliation with the International Longshoremen's Association, this will bring the loading or unloading of the vessel to a complete halt, thus forcing the ship's owner to accede to MMP's featherbedding demands, if not to replace the crew as well.

As the Court of Appeals properly concluded in this case, "Whether the immediate picketing objective is wholesale replacement of existing personnel or a more subtle attempt to force the employer into a breach of the existing contract with MEBA, the ultimate effect is equally coercive of Newport's right to select its grievance adjusters" (Pet. App. 8a, n.6).

CONCLUSION

The decision of the Court of Appeals, far from constituting a departure from precedent, is in full accord with the decisions of the Fifth and District of Columbia Circuits in similar cases.[8] Thus, there is no conflict among the Circuits warranting Supreme Court review. Neither does the decision of the Court below demonstrate a judicial usurpation of the Board's authority to interpret the Labor Act; the Court simply brought the Board's aberrational decision into line with established Board and Court precedent.

The issue herein is of importance only to MMP, which is seeking some means of gaining a stranglehold upon American shipping in order to impose its outdated and unwarranted manning standards upon unwilling American shippers. This, of course, presents no reason for granting review. Indeed, the National Labor Relations Board itself has accepted the Fourth Circuit's decision herein and is not seeking certiorari.

For the reasons set forth above, we submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[8] There is no longer even a conflict among the *judges* of the Courts of Appeals. See note 6, *supra*.